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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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DEC 3 - 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Chibardun Telephone Cooperative, Inc. )  
CTC Telecom Inc. )  
 ) CC Docket No. 97-219  
Petition for Preemption Pursuant )  
to Section 253 of the Communications Act )  
of 1996 )

**COMMENTS OF THE  
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association ("USTA") hereby files these comments in response to the Commission's Public Notice <sup>1</sup> regarding the Petition filed by Chibardun.<sup>2</sup> USTA is the principal trade association of the local exchange carrier industry.

As a rural telephone company, Chibardun provides local exchange, exchange access, and cable television service in a number of communities in Wisconsin.<sup>3</sup> In its Petition, Chibardun requests that the Commission preempt the City of Rice Lake, Wisconsin, pursuant to Section

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<sup>1</sup> Public Notice DA 97-228 released October 20, 1997.

<sup>2</sup> Chibardun *Petition for Section 253 Preemption* ("Petition"), filed October 10, 1997.

<sup>3</sup> *Petition* at 2.

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253<sup>4</sup> of the Telecommunications Act of 1996,<sup>5</sup> from imposing barriers to entry that would prevent Chibardun from providing competing local exchange and cable television service in Rice Lake. Specifically, Chibardun requests that the Commission preempt the City of Rice Lake from the following activity:

(a) ... insisting that Chibardun sign the City's proffered "License Agreement For Use of City Rights-of-Way" as a precondition for the City's grant of the excavation permits which Chibardun needs to construct its proposed new Rice Lake telecommunications facilities; (b) ... enforcing Ordinance No. 849, which the City adopted August 26, 1997, to restrict the issuance of excavation permits for the construction of telecommunications facilities by newcomers ....; (c) ... adopting and enforcing a future right-of-way ordinance placing higher fees, and more stringent conditions and restrictions upon entities seeking to compete ....; and (d) ... engaging in practices which impose anti-competitive and discriminatory costs, delays and conditions upon Chibardun and others ....<sup>6</sup>

As acknowledged by the Supreme Court, the 1996 Act is "an unusually important legislative enactment" whose "major components ... were designed to promote competition in the local telephone service market."<sup>7</sup> Therefore, Commission preemption of state and local ordinances that impede competitive entry, and the delivery of new services to residential and business customers, is among the most important regulatory functions undertaken by the Commission.

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<sup>4</sup> 47 U.S.C. § 253.

<sup>5</sup> *Telecommunication Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§151 *et seq.*

<sup>6</sup> *Petition* at 1-2.

<sup>7</sup> *Reno v. ACLU*, 117 S. Ct. 2329, 2337-2338 (1997).

Section 253 provides the statutory framework for the Commission to determine if state and local regulations create barriers to entry for new competitors. State and local governments are prohibited from imposing legal and regulatory requirements that interfere with the ability of any entity to provide interstate and intrastate telecommunications services.<sup>8</sup> Where states and localities impose legal and regulatory requirements that are otherwise not barriers to entry, they must be applied on a competitively neutral basis “to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>9</sup> In managing public rights-of-way, states and localities may impose a fee for use of public property when such fees are publicly disclosed, are “fair and reasonable,” applied on a “competitively neutral basis,” and access to public rights-of-ways is made available on a nondiscriminatory basis.<sup>10</sup> The Commission is required to preempt state and local laws and regulations which violate Section 253(a) and (b).<sup>11</sup>

Recently, the Commission reiterated its standard of review in assessing whether to preempt a state or local statute or regulation. The Commission stated:

[T]he exercise of our preemption authority ... is governed primarily by two distinct, but related, standards. First, section 253 of the Act directs us to preempt any state or local requirement that “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,” subject to the limited exceptions set forth in subsections 253(b), (c) and (f). Second, the Supreme Court has repeatedly

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<sup>8</sup> 47 U.S.C. § 253(a).

<sup>9</sup> 47 U.S.C. § 253(b).

<sup>10</sup> 47 U.S.C. § 253(c).

<sup>11</sup> 47 U.S.C. § 253(d).

affirmed federal preemption where there exists a conflict between federal and state law. Such a conflict may arise “where compliance with both federal and state law is in effect physically impossible” or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>12</sup>

The Commission’s decision in *Classic Telephone*<sup>13</sup> is directly applicable to the Commission’s review of the scope of permissible management of public rights-of-way and imposition of compensation requirements for the use of such rights-of-way by state and local governments. In its *Order*, the Commission discussed the extent to which Congress intended states and localities to exercise their authority to manage access to public rights-of-way pursuant to Section 253(c):

Section 253(c) preserves the authority of State and local governments to manage the public rights-of-way, but requires such regulations to be both competitively neutral and nondiscriminatory. In addition, section 253(c) permits State and local governments to impose compensation requirements for use of the public rights-of-way so long as such compensation is fair and reasonable, competitively neutral, nondiscriminatory, and is publicly disclosed. The legislative history sheds light on permissible management functions under section 253(c). During the Senate floor debate on section 253(c), Senator Feinstein offered examples of the types of restrictions that Congress intended to permit under section 253(c), including State and local legal requirements that: (1) “regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;” (2) “require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other

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<sup>12</sup> *In the Matter of the Public Utility Commission of Texas*, CCBPol 96-13, *Memorandum Opinion and Order* at 5, ¶6 (released October 1, 1997).

<sup>13</sup> *See Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082 (1996).

utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."<sup>14</sup>

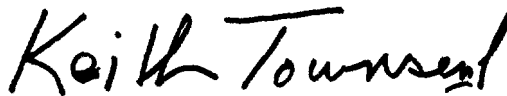
USTA supports efforts to ensure that state and local governments comply with the letter and spirit of Section 253. The regulations described in the Petition, and as applied to Chibardun, bear no relationship to the management of public rights-of-way identified in Section 253 of the Act, are contrary to the intent of Congress, and inconsistent with prior Commission decisions. USTA urges the Commission to act expeditiously to preempt these inconsistent requirements imposed by the City of Rice Lake on Chibardun, and other entities who may wish to provide competitive telecommunications services.

Respectfully submitted,

**UNITED STATES TELEPHONE ASSOCIATION**

December 3, 1997

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<sup>14</sup> *Classic Telephone* at 13103, ¶39.